OUTER HOUSE, COURT OF SESSION

[2021] CSOH 91

P175/21

OPINION OF LORD SUMMERS

In the Petition of

DEAN RYAN

Petitioner

For judicial review of a decision of the Parole Board

Petitioner: Crabb; Drummond Miller
Respondent: Lindsay QC; Anderson Strathern

3 September 2021

[1] The petitioner challenges a decision of the Parole Board dated 10 December 2020. The Parole Board at their meeting on that date decided that the petitioner should move from prison to an open prison and that he should not be permitted to move to the community on licence.

[2] The minute of the Parole Board's decision, so far as relevant, states as follows:

> "41. The Board, having considered the evidence, is satisfied that it is necessary for the protection of the public that Mr Ryan should be confined.
>
> 42. In reaching its decision, the Board took into account: a) the circumstances of the index offence and any offending history; b) the assessed high level of risk and needs; c) conduct since sentence, and intentions if released; d) all relevant information in the dossier; and e) the evidence heard at the hearing.
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> 43. The Board is mindful of the very serious nature of the index offences and the circumstances surrounding Mr Ryan's recall on two previous occasions.

The evidence is that Mr Ryan continues to present a high level of risk and needs.

44. The evidence of both social workers was supportive of the view that Mr Ryan's risk can be managed. However, both social workers indicated that, normally progression to the Open Estate would be appropriate. Ms George, who will be responsible for Mr Ryan's supervision upon release, expressed the view that if supervised home leaves were possible and a community work placement available then she would have recommended progression by Mr Ryan to the Open Estate before he is released. Her opinion in relation to management of Mr Ryan's risk has to be seen in that context.

45. It is necessary to set the view of the social workers against the whole background to the circumstances of this case. Mr Ryan's decision making leading to both of his recalls took place where he already had completed course work designed to provide him with the necessary skills to comply with his management in the community. His poor decisions were consciously made notwithstanding there may have been over confidence and complacency on his part in the period leading up to recall.

46. The Board does not accept that progression to the Open Estate will not have a value even if it turns out that supervised home leaves and or a community work placement do not prove to be possible for whatever reason. The regime in the Open Estate is by its very nature significantly different from closed conditions. Mr Ryan's continuing ability to continue to deal with challenges in a more open environment will be tested. In any event, it may well be possible for testing to be more extensive than is presently envisaged.

47. It is fair to note that Mr Ryan presented well at the hearing. Mr Ryan gave the impression that he has an insight into his difficulties and appears to be genuine in seeking to overcome them. The Board accepts that he has been of good behaviour while in custody. Mr Ryan seems to be capable of good decision making while in custody. It is when he has greater autonomy that difficulties arise. In the opinion of the Board being subject to a more open regime is necessary to test further whether the risk that he poses can be managed.

48. In view of the need to obtain a First Grant of Temporary Release and the time that may take, the Board considered that a review period of twelve months is required so that there can be a meaningful period of testing in the Open Estate."

[3] The petitioner challenges the reasoning set out at paragraphs 44-46 of the above minute. I hope I do no disservice to Mr Crabb who appeared on behalf of the petitioner if I

summarise his submission. He submitted that the Parole Board's decision was irrational and that they had failed to give adequate reasons for deciding that he should not be released to the community (see paragraph 44). The petitioner further submitted that the Parole Board had placed too little weight on the successful completion by the petitioner of Constructs Groupwork Programme and too much weight on his high risk of re-offending (see paragraph 42). Mr Crabb provided me with a detailed Note of Argument. I was also favoured with a lengthy account of the relevant case law. But rather than repeat the petitioner's submissions in that connection I have sought to focus on the terms of the minute issued by the Parole Board and the reasons it narrates for refusing to release the petitioner into the community.

[4] Paragraph 44 sets out the evidence of two social workers and another witness, Ms George. The social workers thought that the petitioner's risk could be "managed". Although the Parole Board do not say where he could be managed, the petitioner acknowledged that the social workers had given evidence that with suitable measures in place the petitioner could be managed in the community. That therefore is how the petitioner as an informed reader would have understood this part of the minute. The Parole Board go on to record that while the social workers thought the petitioner could be managed in the community they accepted that this would not be the normal way to manage a release. Normally prisoners progress through the open estate before moving to the community. The Parole Board then summarise the view of Ms George. She did not support release directly to the community. She accepted that the petitioner could be placed in the community if suitable measures were in place but thought that he should go to the open estate first.

[5] The Parole Board therefore had to decide whether to follow the social workers' recommendation or accept Ms George's recommendation. We know from the outcome that

they decided to accept Ms George's recommendation. In saying that the social workers' view had to be set "against the whole background to the circumstances of this case" it is evident that the Parole Board considered the petitioner's background suggested that the petitioner should not be released directly to the community. The Parole Board then refers back to "both his recalls". The petitioner as an informed reader would have understood this allusion. The petitioner had been released into the community on two previous occasions. On both of these occasions he had passed through the open estate and into the community. The parties were agreed that the "course work" to which the Parole Board refers is course work completed by the petitioner in the open estate. The petitioner, as an informed reader, can be assumed to know about his prior offending and to know that he had offended despite being given support in the open estate. While in the open estate he would do course work designed to prepare him for release. Despite the work done with him he had been recalled on both occasions. As the petitioner and those advising him know although he had managed to avoid trouble for a period of time after release, on both occasions he had got into trouble. On the first occasion he was convicted of a serious offence involving dishonesty. On the second occasion he had been prosecuted for sexual offending against two women. Although he was acquitted of both charges, his interactions with the women in question were, irrespective of the offending behaviour alleged, a cause of serious concern. The Parole Board considered that his conduct exhibited "poor decision making". The concluding line of the paragraph acknowledges that his relapses could be explained by over confidence. But the Parole Board expresses the concern that whatever might be said in mitigation "bad decisions" were "consciously made".

[6] In my judgement when this paragraph is set in its context and the petitioner's knowledge of how the system of release works is taken into account there can be no doubt

why he was not permitted to move directly to the community. It is evident that the Parole Board thought that if his rehabilitation had failed after he had been supported in the open estate, it was not reasonable to think he would fare any better if he went directly back to the community.

[7] The Parole Board could and perhaps should have set out their reasoning more fully. But I am satisfied that their meaning is clear and that the petitioner as an informed reader should have understood the position.

[8] If paragraph 45 is designed to explain why the petitioner's history justified a more cautious and not less cautious strategy, paragraph 46 is designed to present a positive reason for moving to the open estate. I accept again that the minute could have been worded more clearly. The paragraph begins with a double negative. But again in context the Parole Board's meaning is clear. Here the Parole Board is seeking to explain why it felt the move to the open estate was necessary even if release on licence proved impossible. Mr Lindsay QC explained that there had been some uncertainty as to whether the social workers' proposal could work or not. It was unclear as to whether the petitioner's mother could offer him a home in the community and it was unclear whether the Covid crisis would prevent a community placement. When the Parole Board decided the matter they did not know how these matters would fall out. The Board's point is that even if the community placement fell through, progression to the open estate was still the correct way forward. It expresses the view that testing in the open estate would be valuable even if the social workers' preferred course of action was not possible. It should be recalled that the social workers were only prepared to contemplate release on licence if these conditions were met (paragraph 44). As it happens they were not. The petitioner's preferred option was impossible. I accept however that notwithstanding this the petitioner is entitled to challenge

the Parole Board's decision if it could be shown to be irrational or defective in some way on the facts known to them.

[9] I am sure the petitioner was disappointed with the decision. As counsel emphasised he had successfully completed the Constructs Groupwork Programme and no doubt hoped for a more favourable outcome. I have read Ms Craig's report of 4 December 2020 and acknowledge all that she says. While the petitioner is to be congratulated on his completion of the programme the final decision lies with the Parole Board. The option it chose was one that was reasonably open to it. The Parole Board is an expert body and was not bound to follow the social workers' preference. Its decision rests on comprehensible and rational reasons. In essence it decided that to move the petitioner directly into the community was a more risky approach than moving him to the open estate. It was not impressed by the fact that his previous relapses had taken place in the community even though support had been offered for that transition. In the Parole Board's view the social workers' approach entailed a more risky approach than the ones that had been tried before. Its decision was that the petitioner required a graduated route to release.

[10] The petitioner also submitted that the Parole Board had approached risk in the wrong way. It had relied too heavily on a recent report (LS/CMI) which evaluated the petitioner's risk as high. I was referred to a report in 2006 that took a more benign view of the petitioner's risk. But as Mr Lindsay observed that report is now seriously out of date. Whatever the position I do not think that the Parole Board paid excessive deference to the LS/CMI report. At paragraph 45 it records the serious nature of the index offence and the "evidence that the Petitioner continues to present a high level of risk". The Parole Board did not endorse that view. They record it. Their reasoning thereafter demonstrates that they did not regard the report as a "road block" on the road to release. The Parole Board has shown

that they appreciate that risk is not static and is affected by environment. They endorsed a move to open prison and a more relaxed approach to the petitioner's management. They accepted that the petitioner should move back to the community. The issue they had to deal with was whether that was best done on a gradual basis rather than by a direct switch to a community based placement. It is no surprise given his past and the two failures to which reference is made in the minute, that they took a graduated approach.

[11] In examining matters I have been considerably assisted by Lord Braid's summary of the law in *Crawford, Petitioner* 2021 SLT 822**.** I have checked the Parole Board's minute against his precis of the law. I can advise that I am satisfied that the minute is worded with sufficient clarity. I consider that the petitioner could have been in no doubt why he was not released into the community. While he may be disappointed that the views of two experienced social workers were rejected, the Parole Board was not bound to follow their lead. It would appear to me that the Parole Board was entitled to weigh up their views and reject them provided the reasons for doing so were rational and comprehensible.

[12] I have given the Parole Board's decision anxious scrutiny. I acknowledge that the petitioner remains in prison long after the punitive element in his sentence has come to an end and such a state of affairs requires to be justified by the clearest possible considerations. Whether such a justification exists depends on the facts. In this case as the Parole Board acknowledges there is a compelling reason why he remains in prison so long after the punishment part for his murder conviction has expired. That reason is to be found in his conduct when previously released. When he has been released before things have not gone well. This provides a good reason for the Parole Board's cautious approach to his risk management. It should be recalled that the Parole Board did not decide that he should remain in prison. It decided that he should re-enter the community but do so via the open

estate. Mr Crabb sought to persuade me that the social workers' recommendation was expert evidence of the sort referred to in *Brown* v *Parole Board for Scotland* 2021 SLT 687 at pages 693-694. I was not persuaded that their views should be called expert evidence although I have no reason to doubt their experience. But even if it was expert evidence they acknowledged that progression through the open estate was the normal approach to risk management. As I read the Parole Board's summary of Ms George's evidence she favoured progression through the open estate even if he could be managed in the community. I do not consider that the opinion of the social workers was mishandled by the Parole Board and am satisfied that it was given appropriate weight.

[13] The correct law has been applied and I am satisfied that the Parole Board has directed itself to the correct question namely whether the petitioner's continued confinement is necessary for the protection of the public as required by section 2(5)(b) of the Prisoners and Criminal Proceedings (Scotland) Act1993 .

[14] In these circumstances I will sustain the fourth plea-in-law for the respondent and refuse the petition.